DATO' YAP PENG ENG & ORS

v.

PUBLIC BANK BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL MALEK AHMAD JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-03-91-96]
1 JULY 1997

BANKING: *Banks & banking business - Whether respondents were agents of appellants - Whether disposal of securities illegal - Regulation 2 of the Essential (Protection of Depositors) Regulations 1986*

CONTRACT: *Frustration - Whether contract between appellants and respondents frustrated - Whether test of frustration satisfied*

CIVIL PROCEDURE: *Stay of proceedings - Striking out - Whether O. 18 r. 19 of the Rules of the High Court 1980 applicable*

This was an appeal by the appellants against the decision of the Judicial Commissioner.

The appellants had by several contracts with the respondents obtained various sums of money from the latter. Security was provided in the form of public quoted shares or land. The respondents were not paid what was due to them and the respondents obtained an Order prohibiting the appellants and their agents from dealing with the assets of the former. The appellants however had available to them a right to redeem or obtain a discharge of charge in respect of the securities pledged to the respondents. The respondents then took steps to exercise their rights. Where immovable properties were involved consent from Bank Negara was obtained before the forced sale.

The appellants took a writ against the respondents claiming damages and among others a declaration that the sale of the immovable properties was illegal and void. The respondents applied to strike out the appellants' action. The Deputy Registrar allowed the respondents' application and the appellants appealed to the judge in chambers. The appellants argued that the Order was not applicable due to their relationship with the respondents who were their bankers and so by virtue of that the impugned transactions had become frustrated. The Judicial Commissioner dismissed the appeal and confirmed the Registrar's order.

Held:
Per Gopal Sri Ram JCA

[1] The bankers were not the agents of the appellants. They were included in the definition of reg. 2 of the regulations to cover situations where an agency relationship is presumed to exist or is proved to exist as where a person or a corporation affected by an order pursuant to reg. 8 may have monies or titles to movables or immovables lodged with the bankers for safekeeping.

[1a] The Order has no application where the relationship between the banker and a person or corporation is one of creditor and debtor or surety and creditor.

[2] It was for the appellants to apply for and obtain the consent of Bank Negara if they had wished to exercise their right of redemption over movables or to discharge a charge over immovables.

[2a] On the facts of the case the test for frustration was not satisfied as consent from Bank Negara for the Order was applied for and obtained.

[3] Order 18 r. 19 of the Rules of the High Court 1980 was applicable to the case and it was suitable for summary disposal.

[Appeal dismissed. Order below affirmed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PERBANKAN: *Bank dan Perniagaan Perbankan - Samada responden merupakan agen-agen perayu - Samada pelupusan sekuriti-sekuriti tak sah - Peraturan 2, Peraturan-Peraturan Perlu (Perlindungan Pendeposit-Pendeposit), 1986*

KONTRAK: *Kekecewaan - Samada kontrak antara perayu-perayu dan responden-responden dikecewakan - Samada ujian kekecewaan telah dipenuhi*

PROSEDUR SIVIL: *Penggantungan prosiding - Pembatalan - Samada A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 terpakai*

Ini merupakan satu rayuan oleh perayu terhadap keputusan Pesuruhjaya Kehakiman.

Perayu telah melalui beberapa kontrak dengan responden-responden mendapatkan pelbagai jumlah wang daripada pihak yang terkemudian ini. Jaminan telah diberikan dalam bentuk saham-saham sebutan awam atau tanah. Responden-responden telah tidak dibayar apa yang kena dibayar kepada mereka dan responden-responden telah mendapatkan satu Perintah yang melarang perayu-perayu dan ejen-ejen mereka daripada berurusan dengan aset-aset pihak

yang terdahulu. Namun begitu Perayu-Perayu telah mengadakan bagi mereka hak untuk menebus atau mendapatkan satu pelepasan gadaian berhubung dengan jaminan-jaminan yang telah disandarkan kepada responden. Responden-responden kemudiannya telah mengambil langkah-langkah untuk melaksanakan hak yang ada bagi mereka itu. Di mana harta-harta tak boleh alih terlibat, persetujuan atau kebenaran daripada Bank Negara telah diperolehi sebelum jualan paksaan dijalankan.

Perayu-perayu telah mengeluarkan writ terhadap responden-responden menuntut gantirugi dan antara lainnya satu pengisytiharan bahawa jualan harta-harta tak boleh alih itu adalah tak sah dan batal. Responden telah memohon untuk membatalkan tindakan perayu. Timbalan Pendaftar telah membenarkan permohonan responden-responden dan perayu-perayu telah membuat rayuan kepada hakim dalam kamar. Perayu-perayu berhujah bahawa Perintah tidak terpakai disebabkan oleh perhubungan mereka dengan responden-responden yang merupakan jurubank-jurubank mereka dan oleh itu menurut keadaan tersebut transaksi yang diragui itu telah menjadi kecewa. Pesuruhjaya Kehakiman telah menolak rayuan itu dan mengesahkan perintah Pendaftar.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Jurubank-jurubank itu bukannya ejen-ejen perayu-perayu. Mereka dimasukkan dalam definisi peraturan 2 peraturan-peraturan untuk melindungi situasi-situasi di mana sesuatu perhubungan ejensi dianggapkan wujud atau terbukti wujud sebagaimana seseorang atau sebuah pertubuhan yang dimudaratkan oleh satu perintah selaras dengan peraturan 8 mungkin mempunyai wang atau hakmilik kepada harta-harta alih dan tak alih yang telah diserah-simpan dengan jurubank-jurubank itu untuk disimpan dengan selamat.

[1a] Perintah itu tidak terpakai di mana perhubungan antara jurubank dan seseorang atau pertubuhan ialah suatu perhubungan antara pemiutang dan penghutang atau penjamin dan pemiutang.

[2] Perayu sepatutnya memohon dan mendapatkan kebenaran Bank Negara jika mereka ingin untuk melaksanakan hak penebusan mereka ke atas harta-harta alih atau melupuskan satu gadaian ke atas harta-harta tak boleh alih.

[2a] Berdasarkan fakta-fakta kes ujian untuk kekecewaan telah tidak dipenuhi kerana kebenaran daripada Bank Negara untuk Perintah itu telah dipohon dan diperolehi.

[3] Aturan 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 terpakai bagi kes itu dan dengan yang demikian adalah bersesuaian untuk pelupusan terus.

[Rayuan ditolak. Perintah di bawah diikrarkan.]

Cases referred to:

Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd's Rep 223 ***(refd)***

Andrew Millar & Co Ltd v. Taylor & Co Ltd [1916] 1 KB 402 ***(cit)***

Atlantic Maritime Co Inc v. Gibbon [1953] 2 Lloyd's Rep 294 ***(cit)***

Denny Mott & Dickson v. James B Fraser [1944] AC 265 ***(cit)***

Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd [1942] AC 154 ***(cit)***

Maritime National Fish, Ltd v. Ocean Trawlers Ltd [1935] AC 524 ***(cit)***

Davis Contractors v. Fareham Urban District Council [1956] AC 696 ***(cit)***

Rediffusion (Hong Kong) Ltd v. Attorney General of Hong Kong [1970] AC 1136 ***(refd)***

Rondel v. Worsley [1969] AC 191 ***(cit)***

Wiseman v. Borneman [1969] 3 WLR 706 ***(cit)***

Roy v. Prior [1970] 1 QB 283 ***(cit)***

Schmidt v. Secretary Of State For Home Affairs [1969] 2 149 ***(cit)***

Williams & Humbert Ltd v. W. & H. Trade Marks (Jersey) Ltd [1986] 1 AC 368 ***(cit)***

Legislation referred to:

Contracts Act 1950, s. 57(1)
National Land Code 1965, s. 256
Rules of the High Court 1980, O. 18 r. 19

[Appeal from High Court Malaya, Kuala Lumpur; Suit No: D1-22-66-1994]

For the appellants - KS Narayanan (Logan Sabapathy & Lau Mei Lyn with him); M/s Logan Sabapathy & Co

For the 1st respondent - T Thomas (K Maniam with him); M/s Skrine & Co

For the 2nd respondent - Shamsul Bahrain Ibrahim; M/s Skrine & Co

For the 3rd respondent - Felix Dorairaj (Lawrence Low with him); M/s Dorairaj, Low & Teh

For the 4th respondent - Nitin Nadkarni; M/s Lee Hishammuddin

For the 5th respondent - Dr CV Das (John Mathew with him); M/s Shook Lin & Bok

JUDGMENT

Gopal Sri Ram JCA:

On 8 August 1986 Bank Negara, acting under the powers conferred upon it by reg. 8(1) of the Essential (Protection of Depositors) Regulation 1986 ('the

Regulations'), issued the Essential (Protection of Depositors) (No 14) Order 1986 ('the Order'). That Order reads as follows:

ESSENTIAL (PROTECTION OF DEPOSITORS) REGULATIONS 1986
ESSENTIAL (PROTECTION OF DEPOSITORS) (NO. 14) ORDER 1986

In exercise of the powers conferred by reg. 8 of the Essential (Protection of Depositors) Regulations 1986, the Governor of the Central Bank of Malaysia makes the following order:

1. This Order may be cited as the Essential (Protection of Depositors) (No. 14) Order 1986 and shall come into force on the date of its publication in the Gazette.

2. Each of the persons named or described in the Schedule is hereby required to comply with the following:

(a) to disclose to the Central Bank of Malaysia on or before the 15th August, 1986 the value, nature and whereabouts of any monies, properties and assets owned beneficially by Koperasi Sepadu Berhad (hereinafter referred to as "the Society") whether in the name of any corporation in which the Society has an interest in shares or in the name of any nominee, employee or agent of the Society;

(b) to report to the Central Bank of Malaysia on or before the 15th August, 1986 the value, nature and whereabouts of monies, properties and assets of the Society in his possession or custody or under his control;

(c) not to sell, dispose of, charge, pledge, transfer or otherwise deal with or dissipate his monies, properties or assets, or the monies, properties or assets of the Society, without prior approval of the Central Bank of Malaysia;

(d) not to remove or caused to be removed from, or send out of or caused to be sent out of Malaysia any monies, properties or assets referred to in item (c);

(e) to surrender to the Central Bank of Malaysia on or before the 15th August, 1986 all monies, properties and assets referred to in item (c);

(f) not to leave Malaysia; and

(g) to surrender on or before the 15th August, 1986 all his travel documents to the Director-General of Immigration, save that items (f) and (g) shall not apply to the Society.

SCHEDULE

1. Koperasi Sepadu Berhad which includes all its places of business.

2. Dato Yap Peng (NRIC No. 3414989)
17 Lorong Chelagi
Damansara Heights
51200 Kuala Lumpur.

3. W. Maurice Samson (NRIC No. 3459481)
17 Lorong Pantai 6
Pantai Hills
59100 Kuala Lumpur.

4. Gary Yong Yoon Shing (NRIC No. 4195462)
4 Lengkok Aminuddin Baki
Taman Tun Dr. Ismail
60000 Kuala Lumpur.

5. David Chong Teak Lai (NRIC No. 4153713)
84/86B, Jalan Ipoh
51200 Kuala Lumpur.

6. Dr. John J. Augustin (NRIC No. 3200647)
11 Jalan 12/6
46200 Petaling Jaya
Selangor.

7. Dr. Choo Kooi Fook (NRIC No. 1336375)
3, Jalan Cempaka
Taman Forlong
Setapak.

8. Chong Sang @ Choong Meow Yew (NRIC No. 3406024)
986 Starlight Park
Jalan Tampin
70450 Seremban.

9. Any nominee, relative, employee or agent of any of the persons referred to in items 1 to 8 inclusive, or any corporation in which any of such persons has an interest in shares.

Made the 8th August, 1986

Dato' Jaffar Hussein

[BNM. 5011/2/4/15; PN. (PU) 351.]

Governor
Central Bank of Malaysia

The effect of the Order was, subject to the consent of Bank Negara, to impose a prohibition upon the first appellant and all companies in which he had an interest from dealing with their assets. The Order also contained other prohibitions which are not relevant for the purposes of this case. Among the persons who were prohibited from dealing with the appellants' assets were their agents. The expression "agent" is defined by reg. 2 of the Regulations as follows:

'employee or agent of person' include –

(a) a director, banker, advocate, auditor, nominee or other person employed or appointed by the person at any time before or after the commencement of these Regulations; and

(b) a person who -

(i) has in his possession any property belonging to the first-mentioned person;

(ii) is indebted to the first-mentioned person; or

(iii) has any knowledge or information relating to the business, dealings, affairs or property of the first-mentioned persons;

At the time the Order was made, the second to the fifth appellants had borrowed various sums of money from each of the five respondents before us in this appeal. To each respondent, one or more of these appellants had provided security, either in the form of public quoted shares or land. In respect of those security documents covering movable property, there was in each instrument a clause permitting redemption. The right of discharge (the parallel or equivalent of the English equity of redemption of mortgages under English law) is conferred upon chargors by the provisions of the National Land Code 1965. There was, therefore, at the date on which the Order was made, a right in each of the appellants to either redeem or obtain a discharge of charge in respect of the securities each of them had provided to one or more of the respondents.

It is common ground that the respondents were not paid what was due them under each of the contracts of loan or security transaction they had with one or more of the second to the fifth appellants. Accordingly, they took steps on, various dates, to exercise the rights available to them, in the case of movable property, under the particular memorandum of deposit, or, in the case of immovable property, pursuant to s. 256 of the National Land Code 1965, to realise the securities in their hands for the purpose of obtaining payment. In some of these cases, consent was applied for from Bank Negara before the forced sale took place.

On 19 January 1994, the present appellants issued a writ against the respondents claiming, *inter alia*, a declaration that the sale of the properties to which we had adverted a moment ago, were illegal and void. There was also a claim for damages. Each of the respondents delivered their respective defences to the action. Later, each of them took out an application to have the writ and statement of claim struck out under the provision of O. 18 r. 19 of the Rules of the High Court 1980. These applications were heard together by the learned Deputy Registrar who granted them. The appellants then appealed to the judge in Chambers. The appeal came before the learned Judicial Commissioner who, after hearing the argument over several days, affirmed the Deputy Registrar's order dismissed the appeal. It is against his decision that the present appeal has been bought.

We must pause here and digress a little. We have thus far not spoken about the first appellant. We shall do so now. He was, at all material times, the majority shareholder of all the other appellants and it is the appellants' case that he was in fact the alter ego of all these companies. He had guaranteed the loans to which we referred earlier in this judgment. The learned Judicial Commissioner thought he had no *locus standi* to bring the action. In view of the decision we have arrived at, we find it unnecessary to deal with the point. We shall assume, without deciding the point in issue, that he did have *locus standi* to institute the action.

To return to the mainstream of the case, the gist of the appellants' complaints as set out in the statement of claim turn upon the applicability of the Order to the relationship that subsisted between each of the appellants and one or more of the respondents.

The learned Judicial Commissioner held that the Order did not apply to the facts before him as disclosed in the appellants' pleading. He also however, declined to enter upon the second issue raised by the appellants, namely, that the impugned transactions had become frustrated by reason of the Order.

Before us Mr. K.S. Narayanan has, with his usual ability, argued that even if the learned Judicial Commissioner was right in concluding that the order did not apply to the facts of the case as pleaded so that the sales of the securities were not illegal, nevertheless he was wrong in not going on to deal with the issue of frustration. Had he done so, counsel argued, he would have come to the conclusion that there were serious questions to be tried and that the case was therefore not suitable for summary disposal. The burden of Mr. Narayanan's submission is that the right of redemption and the right to obtain a discharge of charge under each of the relevant security transactions which his clients had with each of the respondents were frustrated by the making of the Order. As counsel vividly put it, the moment any of the appellants had

any or produced any money, it would be frozen under the terms of the order thereby making redemption a physical impossibility. We must say at once that we found this argument attractive. It to commended itself both the merit of logic and the law.

However, after hearing argument of Dr. C.V. Das of counsel for the fifth respondent, who addressed us first on our invitation, and with whose arguments counsel for the other respondents were in agreement, we find ourselves in disagreement with the submissions advanced on the appellant's behalf. For convenience, we will take each of the points as separately argued before us.

First the illegality point. If, as the appellants contend, the act of selling the several securities by the respondents is illegal, this must be so only because the Order applies to the relationship in question. Mr. Narayanan argued that because of the definition of the expression of "employee or agent" in the Regulations, each of the respondents as bankers was the appellants' agent in respect of the properties which they each sold. Since the Order did not permit sale by the appellants or their agents, the respondents as bankers (and therefore agents) had no power to sell. The sale was, for that reason, utterly illegal and void.

We must at once dissent from this point of view. The expression "employee or agent" has been defined in the Regulations to include bankers because persons or corporations affected by an order made pursuant to reg. 8 may have monies or titles to movables or immovables lodged with bankers for safekeeping. In those circumstances, the banker as agent would be caught by any order made under reg. 8. It must not be forgotten that the purpose of an order under reg. 8 is to extend its reach beyond the person mentioned in it. Were it otherwise, orders made under reg. 8 could be thwarted by individuals or corporations by means of temporarily divesting themselves of assets in favour of banks. The conclusion we therefore arrive at is that bankers are included in the definition solely to cover situations where an agency relationship is presumed to exist or is proved to exist.

It follows from what we have said thus far that where the relationship between a banker and a person or corporation against whom a reg. 8 Order is made is not one of principal and agent, but creditor and debtor, or surety and creditor, the Order does not bite. The relationship relied upon on the statement of claim in the instant appeal is one of creditor and debtor and not principal and agent. It is therefore, in our opinion, futile to argue that the Order had the effect of prohibiting the respondents and each of them from disposing of the securities in their hands for the purpose of recovering moneys owed them. In our judgment, the learned Judicial Commissioner was entirely correct in concluding

that the Order had no application to the fact pattern which the statement of claim disclosed.

So much for the first point. We now turn to the second argument.

In response to Mr. Narayanan's submission that the contracts between appellants and respondents were frustrated, Dr. C.V. Das relied on the decision of the English Courts in *Dalmia Dairy Industries Ltd v. National Bank of Pakistan* [1978] 2 Lloyd's Rep 223. He read the following passage from the judgment of Kerr J. ast p. 253 of the report:

> However, leaving aside for the moment contracts affected by war, it is settled law in England (and on the evidence also in India) that a supervening prohibition of some contractually undertaken obligation, which can be overcome by obtaining a licence, will only frustrate a contract at once if the person affected by the prohibition can show that no licence could in any event have been obtained. If this is uncertain, then his obligation is to use his best endeavours to obtain the necessary licence, and the contract then only becomes frustrated if and when all such efforts have failed. In such a situation the 'probability test' never appears to have been applied. It is not reflected in *Andrew Millar & Co. Ltd. v. Taylor & Co. Ltd.* [1916] 1 KB 402 (a case of wartime illegality which was cited by both parties) or in the discussion of that case in *Atlantic Maritime Co. Inc. v. Gibbon* [1953] 2 Lloyd's Rep. 294; [1954] 1 QB 88.
>
> However, whatever may be the position in English law, my task is to make a finding on the evidence about the true construction and effect of s. 56 in relation to Indian law and what I have called the 'wait and see' and the 'probability' tests. As to these tests I can only find that on the material before me there is no shred of any evidence, other than Mr. Lall's unsupported assertions to the contrary, that the 'probability test' is part of the law of India. It is nowhere reflected in the language of s. 56, and I do not see how it can be implied. In the *Satyabrata* case (at p. 326) the Supreme court followed Lord Wright in *Denny Mott & Dickson v. James B. Fraser* [1944] AC 265 by quoting from his speech at p. 274 where he said:
>
> > The issue (frustration or not) has got to be decided by the court *ex post facto* on the actual circumstances of the case.

This statement of the law with which we are in entire agreement was affirmed by the English Court of Appeal in the same case. In the present case, there was, as we have said earlier in this judgment, a provision in the Order which enabled sale or disposal of the assets with the consent of Bank Negara. In our judgment it was for the appellants to apply for and obtain that consent in any case in which they wished to exercise their right of redemption over movables or to discharge a charge over immovables. This, on the facts, was

not done. If there was frustration, and we hasten to add that there was none, it was self-induced. On the authority of *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd* [1942] AC 154, self-induced frustration is not frustration recognised by law. See also *Maritime National Fish, Ltd v. Ocean Trawlers Ltd* [1935] AC 524.

In order to determine whether a contract has been frustrated by a supervening event within s. 57(1) of the Contracts Act 1950, the test that may be safely applied is that laid down by Lord Radcliffe in *Davis Contractors v. Fareham Urban District Council* [1956] AC 696, 729:

> Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

Needless to say, that because of the provision for consent being applied for and obtained from Bank Negara which appears in the order, the test is not satisfied on the facts of this case.

It has often been said thatt the provision of O. 18 r. 19 of the Rules of the High Court 1980 should be applied only in plain and obvious cases. In determining what is a plain and obvious case, the time taken to argue a particular application is not always relevant. As Lord Diplock observed in *Rediffusion (Hong Kong) Ltd v. Attorney General of Hong Kong* [1970] AC 1136, 1159:

> Normally the hearing of such an application does not involve consideration of elaborate arguments and is of a short and summary character. But the court must have a discretion as to the length of the hearing. There have been cases in England where an application of this kind involved an important question and after elaborate arguments it became plain and obvious that the alleged cause of action was unsustainable so that an order to strike out should be made: *Rondel v. Worsley* [1969] 1 AC 191; *Wiseman v. Borneman* [1969] 3 WLR 706; *Roy v. Prior* [1970] 1 QB 283; and *Schmidt v. Secretary of State for Home Affairs* [1969] 2 149.

See also *Williams and Humbert Ltd v. W. & H. Trade Marks (Jersey) Ltd* [1986] 1 AC 368, 435-436, 441.

Having scrutinised the statement of claim and having considered the arguments of counsel advanced before us, we are, as we have indicated earlier, in disagreement with the appellants' contentions advanced before us. In our judgment this is a plain and obvious case and is suitable for summary disposal. The learned Judicial Commissioner was entirely correct in the decision he arrived at and in the reasons he gave.

In the circumstances we would dismiss the appeal and affirm the orders made below. All counsel agreed to allow us to fix costs. We fix costs as follows. The appellants are to pay RM2,000 to the fifth respondent. To each of the other respondents we award RM500 each. The deposit of RM500 lodged by the appellants shall be paid to the fifth respondent in partial satisfaction of its costs.

Oral judgment delivered in open court at the conclusion of arguments.

Reported by Anne Soh